Prabaharan a/l Malayalam v Heiwa Auto Gallery (Larkin) Sdn Bhd & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-01(A)-83–02 OF 2021 AND J-02(IM)-1512–10 OF 2021
YAACOB MD SAM, AHMAD ZAIDI IBRAHIM AND MARIANA YAHYA JJCA
18 JULY 2023

Labour Law — Employment — Whether claimant a 'workman' — Claimant's complaint that he was unfairly dismissed from employment came before Industrial Court ('IC') for adjudication on reference by Minister under s 20(3) of Industrial Relations Act 1967 ('the IRA') — Whether IC rightly determined at outset of proceedings whether or not claimant was 'workman' under IRA — Whether IC rightly found claimant was not employee of respondent company when he was dismissed but was full-time employee of another company at material time — Whether claimant had not told respondent company he had secured full-time employment with another company one month before his dismissal — Whether claimant was dishonest in pursuing claim before IC — Whether High Court rightly dismissed claimant's judicial review application to quash IC's decision

In Appeal No 83 herein, the appellant was dismissed from his employment with the first respondent ('Heiwa') with effect from 14 June 2018 following disciplinary proceedings for committing an alleged misconduct. Prior to the dismissal, the appellant was suspended from work pending the outcome of the disciplinary proceedings. The appellant's complaint that he was dismissed without just cause or excuse came before the Industrial Court on a reference by the Minister under s 20(3) of the Industrial Relations Act 1967 ('the IRA') unknown to Heiwa, the appellant had, from 16 May 2018 onwards, commenced full-time employment with another company ('TC Trucks'). On discovering that fact and that TC Trucks had been paying monthly contributions towards the appellant's SOCSO and EPF accounts from 16 May 2018, Heiwa amended its pleadings in the Industrial Court to state that the appellant had abandoned his employment with Heiwa on 16 May 2018, ie, even before he was dismissed, and that therefore he was not entitled to any relief under the IRA. The Industrial Court agreed with that argument and dismissed the appellant's claim. The High Court upheld the Industrial Court's decision and dismissed the appellant's judicial review application to quash the Industrial Court's award. Appeal No 83 was against that decision. The other appeal herein, No 1512, was by Heiwa against the High Court's striking out of its claim against the appellant in a civil suit for a declaration that he had abandoned his employment with Heiwa and should be ordered to reimburse the company for the salary and EPF contributions it had paid him during the

period when he was suspended from duties.

Held, unanimously dismissing both the appeals and affirming the High Court's decision:

(1) The Industrial Court had jurisdiction to decide at the outset of the reference to it under s 20(3) of the Industrial Relations Act 1967 whether the appellant was Heiwa's employee on the date he was dismissed from employment, ie, the jurisdictional question of whether or not he was a workman under the IRA, before proceeding to hear whether he had been dismissed without just cause or excuse (see paras 12–13).

(2) The Industrial Court was not bound by the findings of Heiwa's domestic inquiry and had the power to hear the matter afresh and evaluate all the evidence again on its own to find that the appellant's dismissal was with just cause and excuse (see para 14).

(3) The Industrial Court rightly found that at the time Heiwa decided to dismiss the appellant in June 2018, he was in fact not its employee because he had already become a full-time employee of TC Trucks since 16 May 2018. The appellant had not lost any salary or employment benefits. He was dishonest in pursing his claim at the Industrial Court when he had, in fact, left Heiwa's employment to become a full-time employee of TC Trucks (see paras 15–16).

(4) The High Court did not commit any appealable error in dismissing the appellant's judicial review application (see para 18).

[Bahasa Malaysia summary

Dalam Rayuan No 83 di sini, perayu telah dibuang daripada pekerjaan dengan responden pertama ('Heiwa') berkuat kuasa dari 14 Jun 2018 berikutan prosiding tatatertib kerana melakukan dakwaan salah laku. Sebelum pemecatan tersebut, perayu telah digantung kerja sementara menunggu keputusan prosiding tatatertib. Aduan perayu bahawa beliau telah dibuang kerja tanpa sebab atau alasan yang adil dihadapan Mahkamah Perusahaan atas rujukan Menteri di bawah s 20(3) Akta Perhubungan Perusahaan 1967 ('APP') Tanpa diketahui oleh Heiwa, perayu telah, dari 16 Mei 2018 dan berikutnya, memulakan pekerjaan sepenuh masa dengan syarikat lain ('TC Trucks'). Apabila mendapati fakta tersebut dan TC Trucks telah membayar caruman bulanan ke akaun PERKESO dan KWSP perayu mulai 16 Mei 2018, Heiwa meminda plidingnya di Mahkamah Perusahaan untuk menyatakan bahawa perayu telah meninggalkan pekerjaannya dengan Heiwa pada 16 Mei 2018, iaitu , sebelum beliau dibuang kerja, dan oleh itu beliau tidak berhak mendapat sebarang relif di bawah APP. Mahkamah Perusahaan bersetuju dengan hujahan tersebut dan menolak tuntutan perayu. Mahkamah Tinggi mengekalkan keputusan Mahkamah Perusahaan dan menolak permohonan semakan kehakiman perayu untuk membatalkan award Mahkamah Perusahaan.

Rayuan No 83 adalah terhadap keputusan tersebut. Rayuan lain di sini, No 1512, adalah oleh Heiwa terhadap Mahkamah Tinggi yang membatalkan tuntutannya terhadap perayu dalam saman sivil untuk satu deklarasi bahawa beliau telah meninggalkan pekerjaannya dengan Heiwa dan harus diperintahkan untuk membayar balik gaji terhadap syarikat dan caruman KWSP yang telah dibayarnya dalam tempoh beliau digantung tugas.

Diputuskan, sebulat suara menolak kedua-dua rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Mahkamah Perusahaan mempunyai bidang kuasa untuk memutuskan pada permulaan rujukan kepadanya di bawah s 20(3) Akta Perhubungan Perusahaan 1967 sama ada perayu adalah pekerja Heiwa pada tarikh beliau dibuang kerja, iaitu, persoalan bidang kuasa sama ada beliau seorang pekerja di bawah APP atau tidak, sebelum meneruskan untuk mendengar sama ada beliau telah dipecat tanpa sebab atau alasan yang adil (lihat perenggan 12–13).

(2) Mahkamah Perusahaan tidak terikat dengan dapatan siasatan domestik Heiwa dan mempunyai kuasa untuk mendengar semula perkara tersebut dan menilai semula semua keterangan dengan sendirinya untuk mendapati bahawa pemecatan perayu adalah dengan alasan dan sebab yang adil (lihat perenggan 14).

(3) Mahkamah Perusahaan berhak mendapati bahawa pada masa Heiwa memutuskan untuk memecat perayu pada Jun 2018, beliau sebenarnya bukan pekerjanya kerana beliau telah pun menjadi pekerja sepenuh masa TC Trucks sejak 16 Mei 2018. Perayu telah tidak kehilangan sebarang gaji atau faedah pekerjaan. Beliau tidak jujur dalam meneruskan tuntutannya di Mahkamah Perusahaan apabila beliau, sebenarnya, telah meninggalkan pekerjaan Heiwa untuk menjadi pekerja sepenuh masa TC Trucks (lihat perenggan 15–16).

(4) Mahkamah Tinggi tidak melakukan sebarang kesilapan yang boleh dirayu dalam menolak permohonan semakan kehakiman perayu (lihat perenggan 18).]

Cases referred to

Assunta Hospital v Dr A Dutt [1981] 1 MLJ 115, FC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481; [1987] 1 CLJ 665, CA (refd)

Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685, SC (refd)

Maritime Intelligence Sdn Bhd v Tan Ah Gek [2021] MLJU 2189; [2021] 4 ILR 417, FC (refd)

Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288, FC (refd)

Sunway University College v Mahkamah Perusahaan Malaysia & Anor [2019] 3 MLJ 749, CA (refd)

Legislation referred to

Industrial Relations Act 1967 s 20(3)

Appeal from: *Prabaharan a/l Malayalam v Hiewa Auto Gallery (Larkin) Sdn Bhd & Anor* [2021] MLJU 1556 (High Court, Johor Bahru)

Gopal Sri Ram (with Manoharan Malayalam and Chua How Li Nee) (M Manoharan & Co) for the appellant.
Gan Techiong (with Wong Wan Ting) (Gan & Lim) for the first respondent.

Yaacob Md Sam JCA:

[1] This court (by a different coram) had directed this appeal Appeal No J-01(A)-83–02 of 2021 ('Appeal No 83') to be fixed for hearing together with Appeal No J-02(IM)(NCVC)-1512–10 of 2020 ('Appeal No 1512') because both appeals arose out of the same facts and same parties. Both counsels agreed that we should hear Appeal No 83 first as our decision on the question of law will enable us to decide Appeal No 1512.

[2] Appeal No 83 concerns the appellant's (Prahabaran a/l Malayalam) appeal against the High Court's decision dismissing an application for judicial review for a certiorari to quash the award made by the second respondent, the Industrial Court. The Industrial Court made an award that essentially decided that the appellant had abandoned his employment with the first respondent and for that reason not avail himself under the provisions of the Industrial Relations Act 1967.

[3] Appeal No 1512 was filed by Hiewa Auto Gallery (Larkin) Sdn Bhd (the first respondent in Appeal No 83) against the decision of the High Court allowing the appellant Prabaharan a/l Malayalam's application to strike out the first respondent's claim in Civil Suit No JA-22NCVC-184–11 of 2019 for a declaration that the appellant has abandoned his employment with the first respondent and the appellant to reimburse the salary and the Employment Provident Fund (EPF) contributions paid by the first respondent to the appellant during his suspension period.

[4] Having considered the submissions by parties, we have adjourned the matter for decision. We will now give our decision and reasons for the decision.

A BRIEF BACKGROUNDS

[5] The appellant was an employee of the first respondent. On 20 March 2018, the appellant was suspended with full salary and benefits pending an investigation into allegation of misconduct. Following the investigation, the B appellant was dismissed from his employment with the first respondent vide a letter dated 6 June 2018. The termination took effect on 14 June 2018.

[6] Based on the appellant's representation that he was still an employee of C the first respondent as at 14 June 2018, his complaint was referred to the Industrial Court by the Minister, pursuant to s 20(3) of the Industrial Relations Act 1967.

[7] Meanwhile, unknown to the first respondent, the appellant had D commenced employment with another company, TC Trucks After Sales Sdn Bhd (TC Trucks) starting from 16 May 2018. In other words, the appellant had commenced his employment with TC Truck After Sales Sdn Bhd about one month before the first respondent's termination letter served and took effect on him, which was on 14 June 2018. At the hearing of the Industrial Court, the E appellant has admitted that he started his new employment even before the termination letter was issued by the first respondent. The fact of the appellant's new employment was discovered by the first respondent's Human Resource Manager while going through the Pertubuhan Keselamatan Sosial (Socso) records of the appellant. The HR Manager discovered that TC Trucks had been F paying monthly Socso contributions for the appellant from 16 May 2018. TC Trucks also revealed that it had been paying Kumpulan Wang Simpanan Pekerja (EPF) contributions for the appellant, who was their full-time employee, from 16 May 2018. One of the witnesses subpoenaed by the first respondent, namely Encik Azman Lan, produced the application form G submitted by the appellant for a job in TC Trucks. In the application form, which was the appellant's own writing, under the space 'Reason for leaving previous job', the applicant stated 'For better offer and wanted to be back in KL area'. When confronted with all the evidence, at the Industrial Court, the appellant's sole reply was that he was a 'freelance worker' or 'part time' with TC H Trucks while waiting for a decision from the first respondent on his disciplinary action.

[8] The Industrial Court had allowed the first respondent's application to amend its statement of reply dated 11 December 2018 by adding the following I paragraph:

> Alternatively, the Company avers that the Claimant has abandoned his employment as Head of B & P Department in the Company on 16.5.2018 when he commenced his employment with his new employer TC Trucks After Sales Sdn Bhd, which paid contributions for the Claimant's EPF and Socso for the month of

May and June 2018. Therefore, the Claimant had abandoned his employment with the Company before the Company's letter of dismissal to the Claimant was issued on 6.6.2018, which took effect from 14.6.2018. Thus, the Claimant is not entitled, in any event, to reinstatement or compensation in lieu of reinstatement.

[9] Upon the amendment of the first respondent's statement of reply, before the Industrial Court proceeded to decide whether the appellant had been dismissed without just cause or excuse, there arose an issue of law for determination ie whether the appellant was a workman as defined in the Industrial Relations Act 1967 as to avail himself of the provisions of the Act.

[10] Several cases have decided on the above issue. In *Maritime Intelligence Sdn Bhd v Tan Ah Gek* [2021] 4 ILR 417 (also reported in [2021] MLJU 2189), the employer had introduced new reasons to try to justify their earlier decision to dismiss the employee. The Federal Court held that an employer may not raise new reasons which were not considered at the time of dismissal of the employee to justify the decision to dismiss.

OUR DECISION

[11] In this instant appeal before us, we are of the considered view that the first respondent did not introduce any new reasons to justify their decision. The facts are completely different. The first respondent had adduced evidence to prove that the appellant had chosen to become a fulltime employee of another company since 16 May 2018, which was before the first respondent decided to issue a letter of termination on 6 June 2018. The evidence was to prove that the appellant was no longer an employee of the first respondent since 16 May 2018, and not to try to justify their decision to dismiss him for misconduct. The first respondent was not aware that the appellant had in fact chosen to leave his employment because he was under suspension with full salary, and did not need to report for work in the month of May 2018.

[12] As for the question as to whether the Industrial Court has the jurisdiction to decide whether the appellant, who was the claimant at the Industrial Court, was an employee of the first respondent on the date when the first respondent made a decision to dismiss him, we found that learned Chairman of the Industrial Court was right to follow *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685. In the judgment of the Supreme Court (at page 699 thereof), the Supreme Court held that the Industrial Court has jurisdiction to 'deal with the jurisdictional question, eg whether the particular claimant is or is not a workman'.

[13] In *Assunta Hospital v Dr A Dutt* [1981] 1 MLJ 115, the Federal Court also decided that the Industrial Court has the jurisdiction to decide whether a

claimant was a workman, before proceeding to hear whether the claimant has been dismissed without just cause or excuse. Chang Min Tat FCJ held as follows:

> In the exercise of its jurisdiction in a reference under s 20(3) the court has a duty to come to a first finding whether or not the claimant was or was not a workman within the definition of a workman in the Act ...

[14] In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; [1987] 1 CLJ 665 this court held that the Industrial Court has power to hear the matter afresh. Thus, although there was a domestic inquiry, such as in this instant case, this should not be a hindrance for the second respondent to evaluate all the evidence again on its own to find the dismissal of the appellant was indeed with just cause and excuse. The second respondent is not bound by findings of the domestic inquiry.

[15] It is only logical that the Industrial Court must have jurisdiction to decide whether a claimant is an employee of the employer at the time of his alleged dismissal. Based on the above authorities, we are satisfied that the Industrial Court was right to make a finding that at the time of the respondent deciding in June 2018 to dismiss the appellant, the appellant was in fact not an employee of the respondent, because he had already become a fulltime employee of another company, namely TC Trucks since 16 May 2018.

[16] In any event, the facts show that the appellant did not lose any salary or employment benefits. He was paid his salary by his new employer after he started working there since 16 May 2018. Since he had decided to leave the employment of the first respondent and became a fulltime employee of another company, we found that the appellant was dishonest in pursuing his claim at the Industrial Court.

[17] It is trite law that an application for judicial review of the decision of a lower tribunal is not an appeal. The decision of the tribunal, the Industrial Court in this instant appeal, is susceptible to judicial review only on the grounds of 'illegality', 'irrationality', 'procedural impropriety' and 'proportionality' (see: *Sunway University College v Mahkamah Perusahaan Malaysia & Anor* [2019] 3 MLJ 749 (FC); *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288 (FC)).

CONCLUSION

[18] For the reasons stated above, we are of the considered view that there is no appealable error committed by the High Court in dismissing the appellant's judicial review application. The appellant's appeal is accordingly dismissed.

[19] Based on our finding that the Industrial Court has jurisdiction to decide on whether a claimant (the appellant) is an employee of the employer (the first respondent) at the time of his alleged dismissal, we must also dismiss Appeal No 1512.

[20] The order of the High Court is affirmed.

[21] We made no order as to costs of both appeals.

Both appeals dismissed and High Court's decision affirmed.

Reported by Ashok Kumar